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STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Judges Talbot, O'Connell and Davis)

WILLIAM POLLARD,

Plaintiff/Appellant,

vs.

Supreme Court No. 140322
Court of Appeals No. 288851
Lower Court Case No. 07-72977-NI

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, d/b/a SMART,

Defendant/Appellee.

BRIEF *AMICUS CURIAE*

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STATEMENT OF JURISDICTION

Amicus Curiae Michigan Defense Trial Counsel agrees with Defendant/Appellee's Statement of Jurisdiction. This Court has jurisdiction over this appeal pursuant to MICH CONST 1963 ART 6, § 4, MCL 600.212, MCL 600.215(3), and MCR 7.301(A)(2), (7).

COUNTER-STATEMENT OF QUESTION PRESENTED

I. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT THE PLAIN LANGUAGE OF MCL 124.419 REQUIRES WRITTEN NOTICE OF A CLAIM TO BE SERVED UPON THE TRANSPORTATION AUTHORITY WITHIN 60 DAYS OF THE OCCURRENCE AND THEREFORE PLAINTIFF'S LAWSUIT WHICH WAS FILED 94 DAYS AFTER THE ACCIDENT SHOULD HAVE BEEN DISMISSED BY THE TRIAL COURT?

Plaintiff/Appellant Answers: No.

Defendant/Appellee Answers: Yes.

Court of Appeals Answers: Yes.

Amicus Curiae MDTC Answers: Yes. While this Court requested, in its June 11, 2010 order, whether *Rowland v Washtenaw County Rd Comm'n*, 477 Mich 197 (2007), should be reconsidered, *Amicus Curiae* the Michigan Defense Trial Counsel (MDTC) asserts that there are several grounds upon which this Court should deny leave to appeal or otherwise affirm the Court of Appeals' decision in the instant case. First, the Legislature's express waiver of governmental immunity must occur in order to subject a governmental agency to the jurisdiction of Michigan courts. Therefore, compliance with the Legislature's narrowly construed exceptions to governmental immunity must occur before subject-matter jurisdiction over claims against these entities is conferred. Strict adherence to the notice provisions in these statutes, therefore, is a condition precedent to a court's ability to adjudicate the merits of a claim against a governmental entity. Defendant/Appellee SMART is a governmental entity within the meaning of the Governmental Tort Liability Act (the GTLA), MCL 691.1401 et seq. Like all other

governmental agencies, it can only be subject to suit if one of the narrowly construed statutory exceptions to immunity applies. As lack of subject-matter jurisdiction may be raised at any time, MDTC submits that this Court may rule *sua sponte* that Plaintiff's failure to comply with the statutory notice provision at issue in this case deprived the trial court of subject-matter jurisdiction. For this reason, the Court of Appeals correctly reversed the trial court's decision to allow Plaintiff to proceed without having first satisfied this predicate jurisdictional threshold.

As an alternative argument, MDTC asserts that this Court should not reconsider a decision that ruled on the propriety of a statutory notice provision significantly different in terminology and scope than the one at issue in this case. The 60-day notice provision applicable to claims against transportation authorities is more precise than the notice provision in the "highway exception" to governmental immunity at issue in *Rowland*. First, the notice provision at issue here requires notice of a "claim" as opposed to merely notice of an "occurrence". Second, the notice provision here applies to all types of claims that might be brought against a publicly funded transportation authority "as ordinary claims against a common carrier." Thus, the statute is broader in its scope in recognition of the many different claims that might be filed against a transportation authority, as opposed to the singular "defective highway" claims addressed in MCL 691.1404(1) and MCL 691.1406, respectively. Third, the Legislature explicitly provides that the notice provision in this case is to be liberally construed in favor of the important function and purpose of public transportation, which is deemed to be "necessary for the public peace, health, safety and welfare." MCL 124.421. Such a legislative mandate does not exist in the notice provision addressed by this Court in *Rowland*. Fourth, the notice provision at issue in this case applies to "ordinary claims against a common carrier". Historically, common carriers were allowed to impose strict notice requirements upon their passengers and

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customers in recognition of the mass services they provide and their quasi-public function. This principle is even more relevant in light of the fact that SMART is a publicly funded transportation authority and therefore its assets and liabilities are inexorably connected to the public fisc.

Finally, important public policy concerns support strict enforcement of statutory notice provisions in assessing the propriety of claims against governmental agencies, and, in this case, a governmental agency that is a publicly funded transportation authority. For these reasons, and as further detailed in this Brief, *Amicus Curiae* MDTC urges this Court to deny leave to appeal or, in the alternative, affirm the Court of Appeals' decision.

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STATEMENT OF INTEREST BY *AMICUS CURIAE*

Amicus Curiae the Michigan Defense Trial Counsel (MDTC) is a statewide association of attorneys whose primary focus is the representation of defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, MDTC accomplishes this by facilitating discourse among and advancing the knowledge and skills of defense lawyers to improve the adversary system of justice in Michigan. MDTC appears before this Court as a representative of defense lawyers and their clients throughout Michigan, a significant portion of whom may be affected by the issues involved in this case.

MDTC is particularly concerned about judicial deviation from the Legislature's mandate concerning statutory notice of claims against governmental entities, which in this case also happens to be a publicly funded transportation authority. This Court's jurisprudence and history explaining the necessity for statutory notice provisions has been thus far consistent with the principle of preserving and broadly conferring governmental immunity and narrowly construing the statutory exceptions thereto. The arguments presented in this Brief in support of strict compliance with such notice provisions are both jurisdictional and matters of important public concern.

INTRODUCTION

Statutory provisions barring suits against governmental entities upon a failure to give notice of a claim within a specified period of time are grounded upon the lack of subject-matter jurisdiction in courts of law over suits that do not strictly comply with the legislative waiver of immunity. The people of the state of Michigan, through the Legislature, vest courts with subject-

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matter jurisdiction in only a small subset of cases against the government.[1] Otherwise, the common-law immunity that pre-existed the GTLA is retained by the state and its subordinate entities.[2] Unless a party complies with these strict, statutory requirements the immunity inherent in the operations of those governmental entities encompassed within the GTLA will not be deemed to have been waived – a necessary predicate to allow a court of law to exercise subject-matter jurisdiction over the suit and to adjudicate its merits.[3] As will be discussed herein, because subject-matter jurisdiction can be raised at any time during a proceeding,[4] and because Plaintiff in this particular case failed to strictly comply with the language of the statutory notice provision, it is MDTC's position that the trial court lacked the predicate subject-matter jurisdiction to adjudicate the claim.[5] Thus, as an alternative to addressing the applicability of *Rowland v Washtenaw County Rd Comm'n*, 477 Mich 197 (2007), this Court may *sua sponte*[6]

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[1] *County Rd Ass'n of Mich v Governor*, 287 Mich App 95, 118 (2010), citing *Pohutski v City of Allen Park*, 465 Mich 675, 681 (2002) ("Sovereign immunity exists in Michigan because the state created the courts and so is not subject to them"). See also *Sanilac County v Auditor General*, 68 Mich 659, 665 (1888).

[2] *Greenfield Constr Co v Mich Dep't of State Hwys*, 402 Mich 172, 193, 194 (1978), accord *Pohutski*, *supra* at 688.

[3] "[S]tatutory relinquishment of common law sovereign immunity from suit must be strictly construed." *Id.* at 197, citing *Manion v State Hwy Comm'r*, 303 Mich 1 (1942), *cert den'd Manion v State of Michigan*, 317 US 677 (1942).

[4] *Fox v Univ of Mich Bd of Regents*, 375 Mich 238, 242 (1965), see also *Bowie v Arder*, 441 Mich 23, 56 (1992), accord *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 574 (2004), citing *Straus v Governor*, 459 Mich 526, 532 (1999).

[5] *Michigan State Bank v Hastings*, 1 Doug 225, 236 (1844). See also *Minty v State of Michigan*, 336 Mich 370, 393, 381-97 (1953) (citing *Van Antwerp v State*, 334 Mich 593 (1952) and stating "[s]tatutory consent to be sued merely gives a remedy to enforce a liability and submits the state to the jurisdiction of the court, subject to its right to interpose any lawful defense"), see also *Greenfield Constr Co*, *supra* at 193.

[6] *Fox*, *supra* at 242. Where a court lacks subject-matter jurisdiction to hear a claim, any action it takes, other than to dismiss the action, is void. *Id.* Courts may consider a claimed lack of

consider the jurisdictional argument and may affirm the Court of Appeals' decision in this case on that basis.[7]

In addition to this argument, and in response to the Court's June 11, 2010 order requesting the parties to address whether *Rowland*, *supra* should be reconsidered, see *Pollard v Suburban Mobility Authority for Regional Transportation d/b/a SMART*, 486 Mich 963 (2010), MDTC submits that the statutory notice provision at issue in *Rowland*, *supra*, MCL 691.1404(1) is remarkably different than the one at issue in this case. Thus, this Court should decline to reconsider *Rowland* based on the statutory provision at issue and the facts of this case. The 60-day notice provision in this case, MCL 124.419, specifically requires personal service of a "claim", as opposed to mere notice of an "occurrence". Moreover, the legislative act of which MCL 124.419 is a part requires a *liberal* interpretation in favor of the important function of public transportation. MCL 124.421. The 120-day notice provision at issue in *Rowland*, *supra*, contains no such legislative mandate.

Further, as discussed below, MCL 124.419 is also distinguishable from MCL 691.1404(1) in that it applies to "claims against common carriers." In recognition of the heightened duties common carriers had at common law, the Legislature made a rational choice to require strict compliance with the 60-day notice provision. While the duties of the publicly

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subject-matter jurisdiction *sua sponte*, even on appeal, and may dismiss the action at any stage of the proceedings upon a recognition that it lacks jurisdictional authority. *Id.* See also *Parkwood Limited Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 776 (2003) (YOUNG, J., concurring) ("lack of subject-matter jurisdiction is a challenge that can be brought at *any* time, even *after* a case is concluded" and "the effect of such an interpretation could prove to be a significant barrier to finality and thus to the efficient administration of justice") (emphasis in original), see also *In re Fraser's Estate*, 288 Mich 392, 394 (1939) (citing authorities).

[7] *Taylor v Laban*, 241 Mich App 449, 458 (2000). Where a court reaches the right result for the wrong reason, the appellate court may affirm, nonetheless.

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funded transportation authority in this case are statutorily defined and restricted by the narrowly construed exceptions to governmental immunity,[8] the rationale underlying the Legislature's choice and the historical treatment of common carriers is particularly helpful in analyzing the 60-day notice provision. A long line of cases establishes that common carriers are entitled to impose stricter notice provisions for claims to be perfected against them because of the mass services that they provide and the important public function they serve.[9] In terms of these interests, the public transportation authority in this case is no different.[10] Therefore, a showing of prejudice upon a failure to provide the requisite notice is not required to compel adherence to these provisions.

Finally, statutes requiring notice of claims upon governmental agencies are supported by the public policy of preserving the ability of these agencies to properly manage their assets and liabilities. The majority of entities that benefit from statutory notice provisions provide mass services to the general public. The risks and costs of doing business for these entities, which are, in many instances, risks and costs borne out by the public at large due to the public's funding or partial funding of these entities through the payment of taxes and subsidies, are substantial. Publicly funded transportation authorities, like Defendant/Appellee SMART, for example, bear the risk that catastrophic incidents can cause injury and damage to a great number of individuals and their property, respectively, upon the occurrence of a single event. Moreover, because of the

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[8] *Ali v City of Detroit*, 218 Mich App 581, 585 (1996); *Martin v RIUTP*, 271 Mich App 492, 496-97 (2006), rev'd on other grounds at 480 Mich 936 (2007).

[9] *Southern Exp Co v Caldwell*, 88 US 264, 266-68 (1874); *St Louis Iron Mountain and Southern Railway Co v Starbird*, 243 US 592, 602 (1917); *Southern Pacific Co v Stewart*, 248 US 446, 449, 450 (1919); *Gooch v Oregon Short Line R Co*, 258 US 22, 23-25 (1922) (HOLMES, J.).

[10] See *Fujimura v Chicago Transportation Authority*, 368 NE2d 105, 106 (Ill. 1977); *Cooper v Bi-State Development Agency*, 510 NE2d 1288, 1291-93 (Ill. Ct. App. 1987).

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large number of passengers who utilize public transportation on a daily basis, it is exceedingly important for transportation authorities to be able to anticipate and assess claims. Notice provisions preserve the ability of these entities to continue to operate as a going concern while assessing the potential costs of such incidents by being able to establish projected costs, consider and determine reserves based upon those projections, and adequately plan for future expenditures as a result of claims arising out of those events. This allows the public entity to limit its exposure and put a fixed cap on potential future damages which, without notice provisions, could be significant and numerous. MDTC offers the following analysis as *amicus curiae*.

ARGUMENTS

I. STRICT COMPLIANCE WITH STATUTORY NOTICE PROVISIONS ALLOWING A WAIVER OF SOVEREIGN IMMUNITY FROM SUIT IS A CONDITION PRECEDENT TO A COURT'S EXERCISE OF SUBJECT-MATTER JURISDICTION OVER THE CLAIM AGAINST A GOVERNMENTAL ENTITY

Defendant/Appellee, Suburban Mobility Authority for Regional Transportation, d/b/a SMART (hereafter SMART), is a transportation authority created within the framework of the Metropolitan Transportation Authorities Act of 1967, MCL 124.401 et seq. (hereafter the MTAA). The GTLA defines governmental agencies to include transportation authorities. MCL 691.1401(d) ("'governmental agency' means a . . . political subdivision"); MCL 691.1401(b) ("'political subdivision' means . . . a transportation authority"). SMART is a transportation authority under the MTAA and is performing a governmental function in the provision of public transportation. MCL 691.1401(f); MCL 124.421. SMART is therefore considered a governmental agency for purposes of the GTLA and the immunity provisions thereof. *Ali v City of Detroit*, 218 Mich App 581, 585 (1996) (noting that SMART, as a transportation authority under the MTAA, was a governmental agency immune from tort liability unless one of the

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exceptions to governmental immunity applies (there, the public building exception)); *Martin v RIUTP*, 271 Mich App 492, 496-97 (2006), rev'd on other grounds at 480 Mich 936 (2007) (applying the GTLA to a transportation authority and stating that unless one of the exceptions to governmental immunity is plead and proved, the authority is immune from suit). Since SMART is a governmental agency and since trial courts do not have subject-matter jurisdiction over claims against governmental agencies absent strict compliance with these statutory provisions, which include their predicate notice provisions, the Michigan Legislature has not vested courts with subject-matter jurisdiction to adjudicate the merits of such claims.

A. Standard of Review

The question of a court's jurisdiction to hear and determine a case is a question of law that is reviewed *de novo*. *Reed v Yackell*, 473 Mich 520, 546-47 (2005), citing *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566 (2002). *De novo* review is also appropriate where the issue raised has constitutional implications regarding the legitimate scope of judicial power. *Warda v Flushing City Council*, 472 Mich 326, 330 (2005).

Subject-matter jurisdiction may be raised at any time by the parties or *sua sponte* by the reviewing tribunal. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 399 (2002), citing *Straus v Governor*, 459 Mich 526, 532 (1999) and *Fox v Univ of Mich Bd of Regents*, 375 Mich 238, 243 (1965) (once a court determines that it has no jurisdiction over the claim, it should proceed only to dismiss the action). See also *In re Fraser's Estate*, 288 Mich 392, 394 (1939) (citing authorities). Thus, the issue of subject-matter jurisdiction may be raised at any time, even on appeal. *Maxwell v Dep't of Envt'l Quality*, 264 Mich App 567, 574 (2004), citing *Phinney v Perlmutter*, 222 Mich App 513, 521 (1997) and *Straus*, *supra*. See also *Parkwood Limited Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 776 (2003)

(YOUNG, J., concurring) ("lack of subject-matter jurisdiction is a challenge that can be brought at *any* time, even *after* a case is concluded") (emphasis in original).

B. Michigan Courts Lack Subject-Matter Jurisdiction Over Claims that Have Not Been Perfected in Strict Compliance with the Legislature's Express Waiver of Immunity

If the common law or statutes of Michigan limit or preclude a court's jurisdiction over a particular class of cases, the courts must yield. See *Nawrocki v Macomb Co Rd Comm'n,* 463 Mich 143, 181 (2000) (the strongest justification exists for adherence to constitutional provisions and statutes), accord *Robinson v City of Detroit*, 462 Mich 439, 463-68 (2000). This command is even more crucial where the legitimate scope of judicial power is concerned. *Warda*, *supra* 472 Mich at 330.

The Michigan Constitution confers jurisdiction in the trial courts over "all matters not ***prohibited by law***." MICH CONST 1963, ART 6, § 13 (emphasis added). The phrase "prohibited by law" references common law and statutory law. See *Champion v Secretary of State*, 281 Mich App 307, 313 (2008), citing *Cheeseman v American Multi-Cinema Inc*, 108 Mich App 428, 433, 441 (1981) (the term "law" referenced in a statute or constitutional provision includes "the entire body of law including but not limited to the constitution, the statutes, administrative rules and regulations, and the common law as embodied in decisions and judgments of courts."). See also *American Youth Foundation v Benona Twp*, 8 Mich App 521, 529 (1967) (the phrase "by law" in constitutional provisions references existing statutory law and common law and the framers are presumed to have knowledge of this existing law and act in accordance therewith), citing *Hall v Ira Twp*, 348 Mich 402 (1957). By statute, circuit courts in Michigan are given "the power and jurisdiction":

> (1) possessed by courts of record at the common law, ***as altered by the constitution and laws of this state*** and the rules of the supreme court, and

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(2) possessed by courts and judges in chancery in England on March 1, 1847, ***as altered by the constitution and laws of this state*** and the rules of the supreme court, and

(3) prescribed by rule of the supreme court.

[MCL 600.601 (emphasis added).]

Additionally, "[c]ircuit courts have original jurisdiction to hear and determine all civil claims and remedies, ***except*** . . . where the circuit courts are ***denied jurisdiction by the constitution or statutes of this state***." MCL 600.605 (emphasis added). According to these provisions, therefore, Michigan courts do not have subject-matter jurisdiction over suits unless it is conferred ***by law***, i.e., by the Michigan Constitution, the common law, or by statute.

Courts are without subject-matter jurisdiction to entertain actions against the government unless such jurisdiction is conferred by law and in accordance with strict adherence to those provisions. *Greenfield Constr Co v Mich Dep't of State Hwys*, 402 Mich 172, 193-97 (1978). A waiver of immunity from suit granted by the sovereign, i.e., the People (more particularly, the Legislature as their representative), presents a threshold jurisdictional question. Thus, before a court can address the merits of a suit brought pursuant to the statutory exceptions to governmental immunity, i.e., before it can exercise its constitutional authority to adjudicate the claim, it must establish that it has jurisdiction to consider it. "It is well settled that a circuit court is without jurisdiction to entertain actions against the State of Michigan unless the jurisdiction shall have been acquired by legislative consent." *Greenfield Constr Co*, *supra* at 194. Moreover, "[l]egislative waiver of a state's suit immunity merely establishes a remedy by which a claimant may enforce a valid claim against the state and subjects the state to the jurisdiction of the court." *Id.* at 193. Thus, unless a party strictly complies with the statutory requirements the Legislature has established to subject governmental agencies to the jurisdiction of Michigan

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courts, the immunity from suit inherent in the operations of those governmental entities will not be waived. *Id.* at 197, citing *Manion v State Hwy Comm'r*, 303 Mich 1 (1942), cert den'd *Manion v State of Michigan*, 317 US 677 (1942). "[S]tatutory relinquishment of common law sovereign immunity from suit must be strictly construed." *Id.*

The jurisdictional nature of governmental immunity can be explained by an exploration of its historical roots. Sovereign immunity is a common-law rule that predated Michigan statehood by centuries. *Ross v Consumers Power Co (On Remand)*, 420 Mich 567, 597 (1984). The "sovereign" was immune from suit unless it consented to the action against it. Historically, there were two rationales for the rule, one "divine" and the other "jurisdictional". The first rationale developed from the belief that the "sovereign", i.e., the king, was "divine" and therefore above the law. As such, the king could do no wrong and was not answerable in a court of law. The second reason was that the "sovereign", i.e., the People, was superior to and the creator of the courts; therefore, no inferior entity existed that could exercise jurisdiction and authority over it. The Oxford Companion to American Law (Oxford Univ Press 2002), p. 757 (explaining that under the American rendition of "sovereignty" power resides in "the People" and is embodied in their respective constitutions, which create a "self-limiting people with all of the necessary characteristics of a true sovereign."), see also *Ross*, *supra* at 597-98 (1984), citing Borchard, Governmental Responsibility in Tort, 36 YALE LJ 1, 17-41 (1926); 3 Holdsworth, History of English Law (5th ed), pp. 458-469; Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 HARV L REV 1, 3-4, 19-20 (1963); Prosser, Torts (4th ed), § 131, pp. 970-71.

Michigan adopted the latter view that the state, as creator of the courts, is not subject to them or their jurisdiction without express consent. *Pohutski v City of Allen Park*, 465 Mich 675,

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681-82 (2002), citing *Ross*, *supra*, accord *Odom v Wayne County*, 482 Mich 459, 477-78 (2008). As this Court stated in *Michigan State Bank v Hastings*, 1 Doug 225, 236 (1844):

> The principle is well settled that, while a state may sue, it cannot be sued in its own courts, unless, indeed, it consents to submit itself to their jurisdiction. [A]n act of the legislature, conferring jurisdiction upon the courts in the particular case, is the usual mode by which the state consents to submit its rights to the judgment of the judiciary.
>
> [*Id.*]

It is for this reason that it has been stated by this Court that governmental immunity is an inherent characteristic of government. *Mack v City of Detroit*, 467 Mich 186, 203 (2002). The GTLA preserved the doctrine as it existed at common law. *Id.* at 202, accord *Pohutski*, *supra* at 705 (by enacting the GTLA the Legislature retained the sovereign immunity that existed at common law in Michigan and extended that immunity to all other governmental entities encompassed within the act, including transportation authorities). An inherent attribute of this retained common-law sovereign immunity is the lack of a court's jurisdiction over claims not perfected in strict compliance with the Legislature's ***express***, but ***limited***, waiver thereof. *Greenfield Constr Co*, *supra* at 193-97, accord *Hastings*, *supra* at 236.

This discussion reveals that the immunity retained by the GTLA is jurisdictional. Moreover, the Legislature, not the judiciary, is the body that expresses the will of the sovereign, i.e., the People, and must therefore be the means by which subject-matter jurisdiction is conferred. *Hastings*, *supra*; *Greenfield Constr Co*, *supra*; *Pohutski*, *supra*; *Odom*, *supra* at 477.

"[This Court's] duty is to interpret [the GTLA] . . . in the manner intended by the Legislature . . . ." *Reardon v Department of Mental Health*, 430 Mich 398, 408 (1988), citing *Hyde v Univ of Mich Regents*, 426 Mich 223, 244 (1986). Thus, in construing the GTLA, "courts may not speculate about an unstated purpose," *e.g.*, the creation of an exception, "where

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the unambiguous text plainly reflects the intent of the Legislature." *Gladych v New Family Homes Inc*, 468 Mich 594, 597 (2002), citing *Pohutski*, *supra* at 683. As a result, "[t]here must be strict compliance with the *conditions* and *restrictions* of the [GTLA]." *Nawrocki*, *supra* at 158-59. See also *Scheurman v Dep't of Transportation*, 434 Mich 619, 629-30 (1990). Thus, the GTLA provisions granting immunity are broadly construed and the exceptions thereto are narrowly drawn. *Nawrocki*, *supra* at 158. (emphasis added).[11]

In keeping with the principle that common-law sovereign immunity exists unless explicitly waived by the narrowly construed statutory exceptions, Michigan courts do not have subject-matter jurisdiction over a claim against a governmental entity unless strict compliance with the statutory predicate therefor is adhered to; such jurisdiction is "denied . . . by the constitution or statutes of this state." MICH CONST 1963, ART 6, § 13; MCL 600.605; MCL 600.601; *Hastings*, *supra* at 236; *Greenfield Constr Co*, *supra* at 194. The Legislature is presumed to have had knowledge of the common-law principles underlying sovereign immunity that pre-existed the enactment of the GTLA. *Wold Architects & Engineers v Strat*, 474 Mich

[11] The principle of statutory construction that requires strict or narrow interpretation of certain statutes has a distinguished pedigree as applied to exceptions to sovereign immunity. 3 Sands, Sutherland Statutory Construction (4th ed.), § 62.01, p. 113 (stating that "the rule has been most emphatically stated and regularly applied in cases where it is asserted that a statute makes the government amenable to suit" and "the standard of liability is strictly construed even under statutes which expressly impose liability"). The rule is not so much one of statutory interpretation as it is one of deference to the inherent characteristic of immunity and the closely guarded relinquishment thereof by the sovereign. *Manion v State Hwy Comm'r*, 303 Mich 1, 19 (1942), cert den'd 317 US 677 (1942); *US v Sherwood*, 312 US 584, 590 (1941) (the government's consent to be sued is a relinquishment of sovereign immunity and must be strictly interpreted); *Shillinger v US*, 155 US 163, 166, 167-68 (1894) ("the congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted"; "[b]eyond the letter of such consent the courts may not go, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the government"; this is "a policy imposed by necessity").

223, 233-34 (2006). As established herein, one of the most fundamental of these principles is the lack of subject-matter jurisdiction in courts over claims against the government absent an express statutory waiver. *Hastings*, *supra*; *Greenfield Constr Co*, *supra*. Therefore, absent strict compliance with all statutory notice provisions required to perfect a claim against a governmental agency, immunity is not waived and courts may not exercise subject-matter jurisdiction over the cause of action.

1. Other Jurisdictions Consider Failure to Satisfy the Requirements of Notice Provisions as a Bar to the Exercise of Subject-Matter Jurisdiction Over the Claim

Failure to comply with statutory notice provisions as a threshold bar to the exercise of subject-matter jurisdiction over a particular case against governmental entities (including transportation authorities) is not a novel or provocative concept, nor would it be indigenous to Michigan were this Court to agree with *amicus curiae* MDTC. Other jurisdictions similarly hold that strict compliance with the statutory notice provision in statutes waiving sovereign immunity is a condition precedent to the consideration of the claim, a jurisdictional issue which is a threshold question that must be addressed before a trial court can even consider the substantive merits. See e.g., *Greene v Utah Transit Authority*, 37 P3d 1156, 1159 (Utah 2001) (stating that "[c]ompliance with the Immunity Act is necessary to confer subject-matter jurisdiction upon a trial court to hear claims against governmental entities"; "[j]urisdictional questions are threshold questions and must be addressed before a trial court can consider other arguments"; "failure to comply with the Immunity Act requires a trial court to dismiss a complaint"; and holding that a bus passenger's failure to strictly comply with the statutory notice provision of Utah's governmental immunity act deprived the trial court of jurisdiction to hear her claims in a suit to recover injuries she sustained while boarding a bus), accord *Suazo v Salt Lake City Corp*, 168 P3d 340 (Utah 2007). See also *University of Texas Health Science Center at San Antonio v*

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Stevens, ___ SW3d ___; 2010 WL 3406146 (Tex App 2010), citing *Dallas Area Rapid Transit Authority v Whitley*, 104 SW3d 540, 542 (Tex 2003) (TX GOV'T CODE ANN, § 311.034 (Vernon 2005), which provides: "Statutory prerequisites to a suit, including the provision of notice, are *jurisdictional requirements* in all suits against a governmental entity."); *City and County of Denver v Crandall*, 161 P2d 627, 632 (Colo 2007) (interpreting COLO REV STAT § 24-10-109(1) (2006) of the Colorado Governmental Immunity Act and stating that "[a]bsent compliance with the 180-day notice requirement, governmental immunity bars suit against the public entity because the trial court ***lacks subject-matter jurisdiction*** over the complaint seeking relief"); *James v Southeastern Pennsylvania Transportation Authority*, 477 A2d 1302, 1304-1305 (Pa 1984) (provision of the Metropolitan Transportation Authorities Act requiring notice to transportation authority within six months of the injury or accrual of a cause of action was a legislative choice expressing a condition precedent to the sovereign's consent to be sued); *Town of Wethersfield v National Fire Ins Co*, 143 A2d 454, 456 (Conn 1958) (provision of statutory notice is a condition precedent to suit), accord *Salgado v Comm'r of Transp*, 942 A2d 546, 549-50 (Conn App 2008) (failure to comply with statutory notice provision's time limits for notice of a defective highway claim was a jurisdictional bar to consideration of the suit); *Warkentin v Burns*, 610 A2d 1287 (Conn 1992) (same and stating that "[s]tatutes in derogation of sovereignty should be strictly construed in favor of the state, so that its sovereignty may be upheld and not narrowed or destroyed"); *CR Klewin Northeast LLC v Connecticut*, 299 Conn 167, 175; ___ A3d ___ (Conn. 2010) (failure to satisfy notice requirement for action against governmental entity deprived trial court of subject matter jurisdiction over claim); *Sylvester v Dep't of Transportation*, 555 SE2d 740, 741 (Ga App 2001) (compliance with statutory notice provision is a condition precedent to subject-matter jurisdiction over suit); *Rodgers v Martinsville Sch*

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Corp, 521 NE2d 1322 (Ind App 1988) (failure to comply with statutory notice provision is a jurisdictional bar to suit against governmental entities); *Gessner v Phillips County Comm'n*, 11 P3d 1131, 1134 (Kan 2000) (compliance with pre-suit statutory notice provision is a condition precedent to filing suit against governmental entity); *Mississippi Dep't of Public Safety v Stringer*, 748 So2d 662, 665 (Miss 1999) (timely compliance with notice of claim statute is jurisdictional condition precedent to action in court).

The same line of reasoning, based on the prerequisite jurisdictional requirement, is adhered to in federal courts with respect to the notice provision in the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2675. Thus, federal courts have consistently recognized that the prior filing of a claim is a jurisdictional prerequisite to the filing of a federal court action under the FTCA. See, e.g., *Celestine v Mount Vernon Neighborhood Health Center*, 403 F3d 76, 82 (2d Cir 2005) (prior filing of an administrative claim is a jurisdictional prerequisite that cannot be waived); *Cook v United States*, 978 F2d 164, 166 (5th Cir 1992) (proper notice of a claim is a jurisdictional prerequisite under FTCA suit); *Cizek v United States*, 953 F2d 1232, 1233 (10th Cir 1992) (because FTCA operates as a waiver of sovereign immunity, its pre-suit notice provisions must be strictly construed, are jurisdictional and cannot be waived); *Meridian Int'l Logistics v United States*, 939 F2d 740, 743 (9th Cir 1991) (denial of a prior administrative claim is a jurisdictional limitation); *Henderson v United States*, 785 F2d 121, 123 (4th Cir 1986) (prior filing of administrative claim requirement is jurisdictional and cannot be waived); *Lykins v Pointer Inc*, 725 F2d 645, 646 (11th Cir 1984) (same).

C. Analysis

All this to demonstrate that courts of the relevant sovereign must first establish that they have jurisdiction to exercise judicial review over a claim that is otherwise without the purview of

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their common-law, constitutional and statutory authority to adjudicate. The statutory notice provisions at issue in this case, and the one in *Rowland*, must be strictly complied with because it is through this mechanisms that the People, through the Legislature, acknowledge their assent to confer jurisdiction and be subjected to suits in their courts.

In terms of how that relates to the present question, it is of primary concern to consider a forum's jurisdiction over a particular action before the propriety of its adjudication thereof can be passed upon. Compliance with the respective statutory notice provisions in statutes allowing suits against governmental entities are a condition precedent to the Legislature's consent to allow suits in the courts. All courts, including this Court, must recognize the jurisdictional limitations imposed upon them by the Michigan constitution, the common law, or the Legislature. *Reed*, *supra*, 473 Mich at 546-47; *In re Fraser's Estate*, *supra* 288 Mich at 394 (1939) (citing authorities). See also *Jay v Two-Bit Corp*, 287 Mich 244, 253-54 (1938) and *Detroit v Rabault*, 389 Mich 329, 331 (1973). "Subject-matter jurisdiction is conferred on the court by the authority that created the court." *Reed*, *supra* at 547, citing *Rabault*, *supra*.

Thus, to allow an interpretation of notice provisions in statutes waiving governmental immunity that is contrary to this Court's interpretation of such provisions in *Rowland*, *supra*, is to allow a judicial usurpation of the Legislature's will, to wit, that the common-law sovereign immunity incorporated into the GTLA cannot be waived unless the express provisions of the statute doing so are complied with. *Robinson*, *supra* at 463; *Pohutski*, *supra* at 681-82; *Greenfield Constr Co*, *supra* at 193-94, 197. To accept the trial court's conclusion in this case that SMART had "actual notice" when the notice provision was, in fact, not complied with, is to accept the proposition that the trial court had the ***jurisdiction*** and the ***authority*** to waive the government's immunity, effectively usurping the Legislature's role as the only body with the

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constitutional authority capable of doing so. MICH CONST 1963, ART 6, § 13; MCL 600.605. These provisions state that trial courts have jurisdiction over all matters "not prohibited by law" and "except" where they are "denied jurisdiction by the constitution or statutes of this state", respectively. *Id.* Both common law and statutes prohibit a court from exercising subject-matter jurisdiction over a governmental entity unless the Legislature expressly provides (1) the ***consent*** to jurisdiction (by compliance with the notice provision) and (2) the ***waiver*** of immunity (in those limited and narrowly construed statutory exceptions found in the GTLA, or other statutes. *Greenfield Constr Co*, *supra* at 194; *Nawrocki*, *supra* at 158-59; *Mack*, *supra* at 195. The trial court's conclusion in this case that something less than strict compliance with the statutory notice was sufficient to allow Plaintiff's case to proceed was, in effect, an extra-jurisdictional act.

Thus, a separate and independent rationale that this Court can turn to in upholding notice provisions *regardless* of "prejudice" to the entity to be notified lies in the fundamental "*retained-unless-surrendered*" nature of governmental immunity. Although this Court stated in *Hobbs v Department of State Highways*, 398 Mich 90, 96 (1976), overruled by *Rowland*, *supra*, that "the only legitimate purpose" it could posit for a notice provision was that it was designed to prevent *prejudice*, notice provisions are, in fact, jurisdictionally grounded. Strict compliance with such provisions is, therefore, a condition precedent to the surrender by the state of its sovereignty in the particular case and a necessary, but not sufficient means of pleading and proving one's cause of action in its courts of law. Thus, "failure to comply with the notice provision ***is*** [] a [***jurisdictional***] bar to claims filed pursuant to the [relevant immunity] exception." *Rowland*, *supra* at 200. While not based on this sweeping jurisdictional argument, *Rowland* nonetheless correctly righted the ship in regard to upholding statutory notice provisions as constitutional; there is no constitutional impediment in requiring more of a party to access courts that were

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created and authorized by the very sovereign whose liability is sought to be established. Indeed, notice provisions, like their narrowly construed statutory siblings are a natural consequence of the "social contract" entered into by the People in vesting courts with limited jurisdictional authority to adjudicate suits in equity and law against the collective sovereign because these provisions cautiously guard the public fisc from unfettered access and potentially devastating economic abuses.

The logical extension of the jurisdictional view of sovereign immunity and the narrow construction given to those exceptional circumstances in which the sovereign *waives* that immunity and consents to be sued in its own courts, thereby vesting jurisdiction in the latter which would not otherwise exist, is to conclude *a priori* that claims not properly perfected by a failure of notice are not cognizable in a court of law. Such a failure would necessarily mean that a court does not have *jurisdiction* to consider the substantive merits of the claim, its *authority* to adjudicate being premised on the strictly observed method by which the Legislature deemed necessary to vest the court with that power. *Greenfield Constr Co*, *supra* at 193, 194.

As this Court stated in *Travelers v Detroit Edison*, 465 Mich 185, 204 (2001), citing *Bowie v Arder*, 441 Mich 23, 39 (1992), "[a] court either has, or does not have, subject-matter jurisdiction over a particular case." Since the Plaintiff in the instant case failed to provide SMART with the requisite notice of a claim within 60 days of the date of the occurrence as required by MCL 124.419 and because SMART is a governmental agency subject to suit only within the narrowly construed exceptions to governmental immunity, the trial court in this case did not have subject-matter jurisdiction to conclude that "actual notice" of the incident was sufficient to effect the waiver and expose SMART to suit. As this Court may *sua sponte* rule on the threshold jurisdictional issue, it may affirm the decision of the Court of Appeals on this basis.

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It should be noted that several applications for leave to appeal in other cases involving less than strict compliance with the 60-day notice provision are currently residing in this Court. *Atkins v Suburban Mobility Authority for Regional Transportation d/b/a SMART*, Unpublished Opinion of the Michigan Court of Appeals, dated October 22, 2009 (Docket No. 288461), Slip Op. at 2, application for leave to appeal pending, Michigan Supreme Court Docket No. 140401 (application for first-party benefits sufficient to satisfy 60-day notice provision with regard to notice of third-party tort claim); *Nuculovic v Hill*, 287 Mich App 58, 68-9 (2010), application for leave to appeal pending, Michigan Supreme Court Docket No. 140578; *Rose v Suburban Mobility Authority for Regional Transportation et al*, Unpublished Opinion of the Michigan Court of Appeals, dated March 30, 2010 (Docket No. 289769), application for leave to appeal pending, Michigan Supreme Court Docket No. 141055. Several other cases have been passed upon by the Court of Appeals in recent months addressing compliance with the statutory notice provision: *Williams v SMART*, Unpublished Opinion of the Michigan Court of Appeals, dated December 9, 2010 (Docket No. 293061); *Smith v Suburban Mobility Authority for Regional Transportation*, Unpublished Opinion of the Michigan Court of Appeals, dated December 16, 2010 (Docket No. 294311) (METER, J., dissenting) (holding substantial compliance was sufficient to satisfy MCL 124.419 and that SMART was estopped from raising the defense of lack of notice). To the extent that these cases involve judicial usurpation of the Legislature's acquiescence in vesting courts with subject-matter jurisdiction over these claims by holding that notice was provided by something less than the strict requirements of the 60-day notice provision, these decisions were made without jurisdictional authority as explained herein.

A firm ruling by this Court that strict compliance with statutory notice provisions is a jurisdictional prerequisite to effecting the government's waiver of its retained immunity would

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be a bright-line rule and clarification that would leave no room for judicial policymaking and case-by-case decisions regarding prejudice to the governmental entity; substantial compliance with the notice provision; or actual notice, implied notice, sufficient notice, passive notice, or general awareness of the occurrence. MDTC submits that both the Plaintiff's bar and the Defendant's bar would significantly benefit from such a rule as it would result in more efficient administration of justice, prompt payment of properly perfected claims, and the preservation of the important functions of government upon which we all rely.

II. THE STATUTORY NOTICE PROVISION AT ISSUE IN THE INSTANT CASE DIFFERS MARKEDLY FROM THE STATUORY NOTICE PROVISION IN *ROWLAND* AND THEREFORE THIS COURT SHOULD DECLINE TO RECONSIDER *ROWLAND*, OR IN THE ALTERNATIVE RULE THAT THE PROVISION AT ISSUE PROVIDES EVEN MORE SUPPORT FOR REQUIRING NOTICE OF ANY AND ALL CLAIMS AGAINST TRANSPORTATION AUTHORITIES AND AFFIRM THE COURT OF APPEALS DECISION

A. Standard of Review

This Court's June 11, 2010 order requesting the parties to reconsider a case interpreting a different statutory provision than the one at issue in the instant case requires a side-by-side examination of MCL 691.1404(1) and MCL 124.419. Issues concerning statutory interpretation are reviewed *de novo*. *Dep't of Transportation v Tompkins*, 481 Mich 184, 190 (2008).

B. The Language of MCL 124.419 Differs Substantially from the Language of MCL 691.1404(1) at Issue In Rowland v Washtenaw County Road Commission

The cardinal rule of statutory construction is to ascertain and give effect to the Legislature's intent. *Michigan Humane Society v Natural Resource Comm'n*, 158 Mich App 393, 401 (1987). When considering that intent, statutory language should be given a reasonable construction *considering the provision's purpose and the object sought to be accomplished. Id.* (emphasis added). Additionally, a Court may not impose its own policy choices when interpreting a statute. *People v McIntire*, 461 Mich 147, 152 (1999), see also *Stabley v Huron-*

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Clinton Metro Park Auth, 228 Mich App 363, 370 (1998). "[C]ourts may not rewrite the plain statutory language and substitute [its] own policy decisions for those already made by the Legislature." *Rowland*, *supra* at 214, n 10 (internal quotations omitted). "The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748 (2002). The meaning of the Legislature "is to be found in the *terms and arrangement* of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." *Gross v General Motors Corp*, 448 Mich 147, 160 (1995) (emphasis added). Further, a court "may not assume that the Legislature inadvertently made use of one word or phrase instead of another." *Robinson v Detroit*, 462 Mich 439, 459 (2000). When parsing a statute therefore, it is to be presumed that "every word is used for a purpose" and effect will be given "to every clause and sentence." *Pohutski v City of Allen Park*, 465 Mich 675, 683 (2002). Therefore, the courts are to avoid an interpretation that makes any part of a statute surplusage or nugatory. *Id.* at 684.

1. MCL 124.419 is More Precise than MCL 691.1404(1) because it Requires Notice of a "Claim" Not Merely Notice of an "Occurrence"

The language in MCL 124.419 of the MTAA is much more precise than the 120-day notice provision at issue in *Rowland*, *supra*, MCL 691.1404(1).[12] Pursuant to MCL 124.419, written notice of a "***claim***" must be served upon a transportation authority, whereas MCL 691.1404(1) only requires notice of an "***occurrence***". *Nuculovic v Hill*, 287 Mich App 58, 68-9 (2010), application for leave to appeal pending, Michigan Supreme Court Docket No. 140578 (discussing the difference in statutory language between MCL 124.419 and MCL 691.1406 (the

[12] The Court of Appeals recently recognized this distinction in *Nuculovic*, *supra* at 69-70, noting that the statutory notice requirement requiring service of a claim upon SMART within 60 days was markedly different than the statutory notice provisions in the GTLA.

notice provision in the "public building" exception to governmental immunity that contains parallel language to the notice provision in MCL 691.1404(1)), see *Ward v Michigan State University*, 485 Mich 917 (2009) (YOUNG, J., dissenting from the remand order), accord *Ward v Michigan State University (On Remand)*, 287 Mich App 76, 80-81 (2010) (analyzing MCL 691.1406 and holding that, consistent with *Rowland*, compliance with the statutory notice provision is a precondition to the ability to recover for injuries).

In *Rowland v Washtenaw County Road Commission*, 477 Mich 197, 200 (2007), the Court addressed the issue of whether the notice provision in MCL 691.1404(1), the "highway exception" to governmental immunity found at MCL 691.1402, should be enforced as written. This notice provision states as follows:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, … shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
>
> [MCL 691.1404(1).]

This Court held that the plain language of this provision should be enforced as written and, as a result "notice of the injuries sustained and of the highway defect must be served on the governmental agency within 120 days of the injury." *Id.* In so holding, the Court overruled *Hobbs v Mich State Hwy Dep't*, 398 Mich 90, 96 (1976) and *Brown v Manistee Co Rd Comm'n*, 452 Mich 354, 456-57 (1996), which had ruled that "absent a showing of actual prejudice to the governmental agency, failure to comply with the notice provision is not a bar to claims filed pursuant to the defective highway exception." *Rowland, supra* at 200. The Court noted that the GTLA "broadly shields a governmental agency from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." *Id.* at 202-03, citing MCL

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691.1407(1). The Court also noted that the GTLA enumerated only six exceptions to broadly conferred immunity and that the Legislature allowed other actions against governmental entities in limited instances. *Id.* at 203 and n 3, citing *Mack v City of Detroit*, 467 Mich 186, 195 (2002).

The statute at issue in this case, MCL 124.419, provides a different "notice" provision for claims against transportation authorities. The statute provides:

> ***All claims*** that may arise in connection with the transportation authority shall be presented as ordinary claims against a common carrier of passengers for hire: Provided, That written notice of ***any claim*** based upon injury to persons or property ***shall be served upon the authority*** no later than 60 days from the occurrence through which such injury is sustained and the disposition thereof shall rest in the discretion of the authority and all claims that may be allowed and final judgment obtained shall be liquidated from funds of the authority: Provided, further, That only the courts situated in the counties in which the authority principally carries on its function are the proper counties in which to commence and try actions against the authority.
>
> [MCL 124.419 (emphasis added).]

The plain language of MCL 124.419 requires that the claimant, or someone on his or her behalf, serve written notice of any and all (or each and every) claim based upon injury to person or property upon a transportation authority no later than 60 days from the occurrence of the alleged accident. Unlike MCL 691.1404(1), this notice provision requires presentment of an actual "claim" – not merely notice of an occurrence.

Moreover, the plain language of this provision requires each claim to be presented separately. For example, transportation authorities are required to pay first-party personal protection insurance (PIP) benefits to individuals injured in accidents involving their buses. These benefits are mandated by the No-Fault Act, which abolished common-law tort liability in certain, specified instances.[13] Contrary to the ruling of some courts,[14] even where a

[13] The No-Fault Act mandates that insurers "pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." MCL

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transportation authority pays these mandatory claims, sends an application for such benefits to the claimant (as in the instant case), and communicates with the claimant for the processing of such claims, if the claimant has not asserted a *separate* common-law tort claim against the transportation authority by giving notice thereof to the transportation authority within 60 days as

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500.3105(1). *Miller v Farm Bureau Mut Ins Co*, 218 Mich App 221, 225-26 (1996). Transportation authorities are the equivalent of an insurer under the No-Fault Act. MCL 500.3101(4); *Trent v Suburban Mobility Authority for Regional Transportation et al*, 252 Mich App 247, 251-52 (2002) (ruling that MCL 124.419 is inapplicable to the statutory notice requirements concerning no-fault claims for personal insurance protection (PIP) benefits). Importantly, after explicitly and broadly abolishing all tort liability, the No-Fault Act retained only certain causes of action allowing for additional liability, and limits the amounts of damages recoverable for those common-law torts that have been abolished. Most notably, MCL 500.3135(1) provides that "[a] person *remains subject to tort liability* for noneconomic loss caused by his or her ownership, maintenance or use of a motor vehicle *only if* the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." (emphasis added). This is an exception to the general abolition of tort liability. *Citizens Ins Co of America v Tuttle*, 411 Mich 536, 548 (1981). The intent of the Legislature, inferable from the face of MCL 500.3135 is clear: the catastrophically injured and the victim of extraordinary economic loss are allowed compensation *in addition to* that provided in MCL 500.3107 (wage loss and medical care expenses) and MCL 500.3110 (dependent care expenses). *Workman v Detroit Automobile Inter-Insurance Exchange*, 404 Mich 477, 508-09 (1979). Otherwise, tort liability was abolished. *Shavers v Attorney General*, 402 Mich 554 (1978).

[14] In the instant case, the trial court ruled that because SMART's claims administrator had sent Plaintiff an application for benefits, among other information that SMART possessed related to the accident, SMART had "actual notice" of Plaintiff's claim for third-party, common-law tort remedies. *Pollard v Suburban Mobility for Regional Transportation d/b/a SMART*, Unpublished Opinion of the Michigan Court of Appeals, dated November 24, 2009 (Docket No. 288851), Slip Op. at 2, compare *Atkins v Suburban Mobility Authority for Regional Transportation d/b/a SMART*, Unpublished Opinion of the Michigan Court of Appeals, dated October 22, 2009 (Docket No. 288461), Slip Op. at 2, application for leave to appeal pending, Michigan Supreme Court Docket No. 140401 (application for first-party benefits sufficient to satisfy 60-day notice provision with regard to notice of third-party tort claim) and *Horvath v Johnson et al*, Unpublished Opinion of the Michigan Court of Appeals, dated August 18, 2009 (Docket Nos. 283931, 284842), Slip Op. at 4-5, application for leave den'd Michigan Supreme Court Nos. 139996, 139997, (CORRIGAN, J., MARKMAN, J., dissenting) (same). Based on the analysis in this brief, and that proposed by Justice Corrigan, MDTC disagrees with the reasoning and holdings of the Court of Appeals in *Atkins* and *Horvath*, and those other cases cited herein finding less than strict compliance with MCL 124.419 as sufficient to allow a claim against a transportation authority to proceed.

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required by MCL 124.419, then the claimant should not be deemed to have strictly complied[15] with the notice provision, which requires notice of each and every such claim.[16] A court cannot simply rule that a claim for mandatory no-fault benefits payable by statute satisfies notice of an entirely separate *tort* claim, which may or may not be viable depending upon the presentation by the parties of their proofs.

Thus, a specifically identified and precise "claim" must be separately and clearly asserted for the statutory notice provision to be satisfied and for the purpose and function of the MTAA to be served. In this case, Plaintiff did not give SMART notice of his claim for third-party, non-

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[15] Statutes allowing for claims against governmental entities should be strictly construed. *Nawrocki*, *supra* at 158-59.

[16] Again, this is a crucial point to be considered in reference to the discussion in Argument I, *supra*. If subject-matter jurisdiction exists over claims against governmental entities only upon satisfaction of the Legislature's express waiver of immunity, then such tort actions against a governmental entity cannot proceed until strict compliance with all facets of such statutes is achieved and proved. Submitting a claim for mandatory benefits under the No-Fault Act is a legislative recognition of the automatic entitlement to such benefits, i.e., it is a legislatively authorized remedy. It is entirely removed and apart from the additional requirements inherent in proving compliance with the notice provisions and establishing a statutory claim against a governmental entity, be it under the "motor vehicle exception", the "public building" exception, or the "defective highway" exception, etc. "Legislative waiver of a state's suit immunity merely establishes a ***remedy*** by which a claimant may enforce a valid claim against the state and subjects the state to the jurisdiction of the court." *Greenfield Constr Co*, *supra* at 193-97 (emphasis added). Compliance with the statutory notice provisions in these statutes does not entitle the claimant to a remedy, but rather, merely opens the courts by express waiver of immunity to allow the party to proceed with proving his case therefor. Since transportation authorities are governmental entities within the meaning of the GTLA and because the only remedies available against them must be proved by bringing the claim within the statutory exceptions established therein, failure to provide timely notice that a claimant intends to pursue such a claim suffers the same fate as those untimely claims under the GTLA. See *Rowland*, *supra*; *Ward*, *supra*.

economic damages, which is a separate, common-law claim that may be pursued in certain circumstances outside of the statutory causes of action recognized by the No-Fault Act.[17]

As with "notice" of a claim for mandatory, no-fault benefits under the No-Fault Act, passive notice or general awareness of an accident or an occurrence by a transportation authority is equally unavailing to satisfy the clear import of this provision, because it does not constitute service of notice of a "*claim*." Only service of written notice of a precise and identifiable claim upon a transportation authority by a claimant will suffice. Police reports, 911 logs, medical bills from the injured person, internal incident reports, etc., do not constitute written service by a claimant or someone on his or her behalf of notice of a claim upon the authority. MCL 124.419.

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[17] MCL500.3135(1). A claim against a transportation authority must fall within the statutory exceptions to governmental immunity in the GTLA. Thus, a claim for third-party tort damages under the No-Fault Act for negligent operation of a motor vehicle must be brought against the transportation authority under the "motor vehicle" exception to governmental immunity, MCL 691.1405; see also *Ali v City of Detroit*, 218 Mich App 581, 585 (1996) (acknowledging that SMART, as a transportation authority under the MTAA, was a governmental agency immune from tort liability unless one of the exceptions to governmental immunity applied) (there, the public building exception) *Martin v RIUTP*, 271 Mich App 492, 496-97 (2006), peremptorily reversed on other grounds at 480 Mich 936 (2007) (applying the GTLA to a transportation authority and stating that unless one of the exceptions to governmental immunity is plead and proved, the government agency is immune from suit); *Maclachlan v CATA*, Unpublished Opinion of the Michigan Court of Appeals, dated January 20, 2005 (Docket No. 252221), Slip Op. at 3, peremptorily reversed on other grounds at 474 Mich 1059 (2006) (stating that "there is no question that . . . a transportation authority . . . is a governmental agency entitled to governmental immunity" and that when such an agency "engages in a governmental function 'it is immune from tort liability, unless the activity . . . falls within one of the other statutory exceptions to the governmental immunity'"); *Bermudez et al v Lee et al*, Unpublished Opinion of the Michigan Court of Appeals, dated August 17, 2004 (Docket No. 249609) (*Bermudez I*) (applying the GTLA to claims against both the transportation authority and against the individual driver and noting that the proper theory against the transportation authority is one of vicarious liability for the alleged negligence of the driver under the motor vehicle exception to governmental immunity, MCL 691.1405, and for either "gross negligence" or "intentional tort" against the transportation authority's driver as to his or her individual liability under MCL 691.1407(2) and (3)), affirmed on subsequent appeal, *Bermudez et al v CATA et al*, Unpublished Opinion of the Michigan Court of Appeals, dated December 27, 2007 (Docket No. 275067).

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General awareness or passive knowledge of an accident or an occurrence is entirely different than service of and receipt of notice of a claim.

Those judicial decisions allowing a suit to proceed on less than strict adherence to the written notice of a claim required by these provisions are essentially replacing the word "claim" in the statute with the distinctly different words "accident" or "incident" or "occurrence", such that the transportation authority's mere awareness of the latter would suffice under the statute to provide the requisite notice of the former. Such judicial substitution is not allowed because it changes the meaning and import of the provision and renders its purpose meaningless. In analyzing a statute, "[t]he interpretive process does not remove words and provisions from their context, infuse these words and provisions with meanings that are independent of such context, and then re-import these context free meanings [or words] back into the law." *Mayor of Lansing v Michigan Public Service Commission*, 470 Mich 154, 167 (2004). Additionally, a statute cannot properly be read "when its words and provisions are isolated and given meanings that are independent of the rest of its provisions." *Id.* Arbitrary substitution of words and phrases in a statute to fit a different meaning or to attribute a greater or lesser significance to the provision is prohibited. *Robinson*, *supra* at 459; *Pohutski*, *supra* at 683-84.

Further, where a statute does not define a term or phrase, it is appropriate to consult a dictionary to ascertain the meaning of such term or phrase. *Brans v Extrom*, 266 Mich App 216, 219 (2005), citing *Peters v Gunnell*, 253 Mich App 211, 220 (2002). Black's Law Dictionary defines the word "claim" as "[t]he aggregate of operative facts giving rise to a right *enforceable by a court*"; "*[t]he assertion of* an existing right"; "any right to payment or to an equitable remedy . . ."; and "[a] *demand for* money or property to which one *asserts a right*." Black's Law Dictionary, Deluxe, 7th Ed., p. 240 (emphasis added). Each of these definitions appropriately

indicates that a claim is a right that must be *asserted* or *presented*. This, of course, cannot be the case for an "accident", "occurrence", or "incident".

Thus, there must be a "claim" for the transportation authority to receive notice of in the first place. Attempts to substitute other events for service of written notice of a "claim" does not comport with principles of statutory construction, see *Mayor of Lansing*, *supra* at 167, nor with the application of ordinary principles of logic, grammar, or reason. See *Ross v Blue Care Network of Michigan*, 271 Mich App 358, 376 (2006) (stating that the court gives effect to every word, phrase, and clause in a statute and judicial construction is appropriate only if reasonable minds could differ regarding the statute's meaning). Here, reasonable minds could not differ in concluding that MCL 124.419 applies only to "claims" against transportation authorities, and not merely to "accidents", "occurrences", or "incidents" in which they are involved. *Ross*, *supra*; see also *Adrian School District v Michigan Public School Employees Retirement System*, 458 Mich 326, 332 (1998). Thus, passive notice or general awareness by SMART of an accident is insufficient to provide the requisite statutory notice to SMART as contemplated by MCL 124.419.

To hold otherwise would render nugatory the statutory notice provision because any potential incident could become the subject of a lawsuit, even if no notice was served, if it can be proved that the transportation authority was aware of the accident. This is completely contrary to the plain and unambiguous language of the notice provision itself and inconsistent with the liberal interpretation mandated by MCL 124.421. The Court of Appeals correctly recognized that mere passive notice or awareness by SMART of an incident or an accident is insufficient.

For the aforementioned reasons, the plain and unambiguous language of MCL 124.419 admits of no other conclusion but that written notice of any claim against a transportation

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authority must be presented to the authority by or on behalf of the actual claimant within 60 days of the accident or occurrence giving rise to injury to person or property. As the Plaintiff in this case failed to do this, his claim fails as a matter of law and the Court of Appeals correctly reversed the trial court's decision.

2. The Legislature Mandates a Liberal Construction of MCL 124.419 to Preserve and Promote Public Transportation

While MDTC submits that the plain language of the statute is sufficient to preclude Plaintiff's claims, the Metropolitan Transportation Authority Act (hereafter the "MTAA"), MCL 124.401 et seq., of which the 60-day notice provision at issue is a part, specifically provides that statutes promulgated under the MTAA are to be liberally construed in favor of supporting the important public service of public transportation. This provides even greater authority for this Court to construe the provision in a manner which prevents prejudice to transportation authorities' ability to economically and efficiently provide the important public service of public transportation.

The purpose and object sought to be accomplished should be considered when interpreting a statute's language. *Michigan Humane Society*, *supra* at 401. MCL 124.421 provides that the MTAA is "necessary for the public peace, health, safety and welfare" and "shall be liberally construed to effect the purposes hereof which are declared to be public purposes." Where the Legislature explicitly provides that an act is to be "liberally construed" to effectuate its purpose, then such a construction controls the court's interpretation of its provisions. *Kinder Morgan Michigan LLC v City of Jackson*, 277 Mich App 159 (2007); *Southeast Michigan Fair Budget Coalition v Killeen*, 153 Mich App 370, 381(1986) (same).

In order to preserve the public purpose of safe and beneficial public transportation by a transportation authority, the statutory provision requiring notice of "[a]ll claims" must be

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liberally construed. This includes interpreting the 60-day notice provision as broadly as possible to avoid claims that threaten the financial integrity of the transportation authority and prejudice its ability to manage its assets and liabilities. Allowing any number of judicially crafted scenarios to substitute for strict compliance with the notice provision provides no predictability and thus no stability. This ultimately threatens the transportation authority's ability to carry out its "public purpose", as expressed in the MTAA, which is "necessary for the public peace, health, safety and welfare." MCL 124.421. When liberally construed, as required by MCL 124.421, to preserve and protect the beneficial purpose of public transportation, the 60-day notice provision must be strictly complied with, rigorously adhered to and consistently enforced.

If this liberal construction were not applied to effectuate the purpose of the MTAA, then some claims, such as those asserted by Plaintiff, could be allowed to circumvent the 60-day notice provision. This would contravene the purpose and intent behind mandatory notice provisions designed to protect the transportation authorities. See *Rowland*, *supra* at 210-12. Thus, at least to this extent, the reasoning of this Court in *Rowland* applies even more when considering the MTAA's "liberal interpretation" mandate. The burdens placed upon transportation authorities in carrying out their functions and fulfilling their public purpose is thoroughly discussed in SMART's supplemental brief at page 4 through 7.

3. MCL 124.419 References Claims Against Common Carriers, Which have Historically Enjoyed a Unique Latitude in Limiting their Exposure to Claims

There is another factor that distinguishes this case from *Rowland* and provides yet another reason that this Court should not reconsider that decision in light of the statutory provision at issue in this case. Historically, common carriers were given wide latitude in imposing strict notice requirements upon claims asserted by their passengers or customers. Such

provisions were upheld long ago, regardless of the existence of "actual notice" or "prejudice" to the common carrier.

At common law, a common carrier acts as an insurer against all loss or damage except that stemming from an act of God or from "the public enemy". *Southern Exp Co v Caldwell*, 88 US 264, 266 (1874). See also *Frederick v City of Detroit Dept of St Railways*, 370 Mich 425, 432 (1963) (common-law duty of a common carrier is one of due care towards its passengers and their property); accord *Mich Centr RR Co v Coleman*, 28 Mich 440 (1874).

However, as explained by the United States Supreme Court, these additional duties and heightened responsibilities in no way precluded the exacting of specific and shortened limitations periods to bring claims against them. Thus, as early as 1874 the Court recognized that the importance of common carriers and the services that they provided to the general public warranted shortened limitations periods for those seeking to assert claims against them. *Southern Exp Co v Caldwell*, 88 US 264, 266-68 (1874). This principle was, in part, a recognition of the heightened duties owed and the responsibilities borne by common carriers. *Id.* at 266. With this heightened duty of responsibility to those over which they had control, common carriers were also given the right to limit their exposure to multiple claims by multiple claimants in recognition of the mass number of individuals they served. As explained by the Court:

> A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that in case of failure by the carrier . . . a claim shall be made . . . ***within a specified period***, if that period be a reasonable one, is altogether of a different character . . . [i]t contravenes no public policy . . . [i]t excuses no negligence [and i]t is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required.
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> [*Id.* at 268 (emphasis added).]

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This principle was later explicitly recognized in the context of notice provisions imposed by common carriers for personal injury to passengers. Thus, in *Gooch v Oregon Short Line R Co*, 258 US 22, 23-25 (1922) (HOLMES, J.), the Court held that the requirement of a common carrier that a passenger serve written notice of a claim for injuries upon the carrier ***within 30 days*** was valid notwithstanding that the carrier had intimate knowledge of the injuries to the passenger shortly after the accident.[18] The Court recognized that while a common carrier cannot exonerate itself from liability altogether for personal injuries caused by its alleged negligence, it could stipulate for written notice of the injury as a precondition to proceeding with the claim and as a prerequisite for the claim to survive as an action at law. *Id.* at 24, citing *Southern Pacific Co v Stewart*, 248 US 446, 449, 450 (1919); *St Louis Iron Mountain and Southern Railway Co v Starbird*, 243 US 592, 602 (1917). Further, answering the dissent's view that sufficient facts and circumstances of the injury had come to the attention of the carrier that "actual" written notice was not required, Justice Holmes reasoned that nothing that had been done or experienced, including "actual knowledge on the part of the employees of the company", could adequately substitute for the required notice to the company or its general manager of a claim for damages for the injuries alleged. *Id.*

Of course, the Michigan Legislature has codified the "notice period" here referred to and has explicitly required the written service of a claim, *any claim*, upon transportation authorities within 60 days of the occurrence. While a transportation authorities' *duties* are now defined by the narrowly construed statutory exceptions to governmental immunity in the GTLA and no

[18] The carrier's agents took the passenger to the hospital after the accident, he was in the hospital for 30 days following the accident under the care of a doctor employed by the carrier, during which time a claims adjuster employed by the carrier twice visited him to discuss the case, and he was discharged some 52 days after the accident.

longer by the common law, in due regard for the important public function and convenience of mass transportation and the burdens of public service placed upon them, the MTAA requires a liberal construction of its provisions to effectuate all of these concerns and considerations.

Other jurisdictions apply the same reasoning in addressing common carriers and notices of claims against them. See *Fujimura v Chicago Transportation Authority*, 368 NE2d 105, 106 (Ill. 1977) (the court held that there was a rational basis for a "shorter" notice period applicable to transportation authorities based on unique functions of the Chicago Transportation Authority and its status as a "common carrier"); accord *Cooper v Bi-State Development Agency*, 510 NE2d 1288, 1291-93 (Ill. Ct. App. 1987).

A failure to serve written notice of any and all claims upon a transportation authority within 60 days of the occurrence or incident giving rise to such claim bars a cause of action. In this case, as explained, the statutory notice provision is markedly different and more stringent in terms of requiring compliance than the provision at issue in *Rowland*, because (1) it requires written service by the claimant of a "claim" as opposed to merely notice of an occurrence; (2) it is part of a legislative act which explicitly requires liberal construction of its provisions in favor of the transportation authority and its public purpose of providing public transportation, MCL 124.421; and (3) it applies the rationale that common carriers have enjoyed an historically wide latitude in requiring strict adherence to notice provisions to perfect claims against them. Thus, while the Court of Appeals in the instant case based its reasoning on *Rowland,* supra, for the additional reasons stated above, this Court should decline to reconsider its correct decision in *Rowland*, and deny leave to appeal, thereby leaving the decision of the Court of Appeals in this case intact.

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III. STATUTORY NOTICE PROVISIONS SERVE IMPORTANT PUBLIC POLICIES

Since the waiver of sovereign immunity originates from the will of the people through the Legislature's consent, it is exceedingly important to note that the costs associated with such a waiver are borne by those granting it. Statutory notice provisions setting a time period for service of a notice of a claim upon a governmental agency serves the immediate function of preventing prejudice to the entity to which they apply. As noted in *Rowland*, notice provisions protect the government agency's operating funds, facilitate investigation and speedy resolution of claims, prevent stale claims from being presented, allow for the creation of adequate reserve funds, and force the claimant to an early choice regarding how to proceed. Ultimately, however, they preserve and protect the public fisc. Notice provisions are protective of the day-to-day operations of important governmental functions and inure to the benefit of the public at large. *Holtham v City of Detroit*, 136 Mich 17, 20 (1904). See also *Moulthrop v City of Detroit*, 218 Mich 464, 470 (1922); *Gable v City of Detroit*, 226 Mich 261, 263 (1924).

Notice provisions also provide predictability. If a governmental entity had to assess the "potential" that some individual might pursue a claim every time there was an accident or occurrence, the point of requiring a claimant to serve written notice within a specified period of time would be utterly meaningless. There would be no predictability and no real ability to anticipate and plan for potential liabilities. If it is sufficient, as some courts have ruled, that an entity is merely aware of any incident or occurrence that might have given rise to a claim, then the notice required by these provisions would be unnecessary. In such cases, the entity will be deemed to *have already been placed on notice*, by virtue of the mere happening of the accident or occurrence. There would be no subsequent requirement to inform the entity of the nature of the defects being alleged, nor of the severity of the injuries being claimed. *Moulthrop*, *supra*,

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accord *Rottschafer v City of East Grand Rapids*, 342 Mich 43, 51 (1955) (variance between defects alleged in notice and defects claimed at trial was fatal to a right of recovery) (internal citations omitted). Indeed, judicially reading into statutory notice provisions a requirement that the governmental entity show "prejudice" or that less than faithful adherence to the notice provision is adequate, would effectively nullify the requirement that the claimant serve written notice of his or her claim upon the entity. This would render the provision a superfluous formality which could be easily cast aside by a trial court's own judicial gloss on the meaning and adequacy of notice. This is contrary to the well-established and applied rule of statutory interpretation that a statutory provision will not be interpreted in a manner that renders its terms meaningless or superfluous. *Odom*, *supra* at 471. In the absence of requiring strict compliance with these notice provisions, there is absolutely no predictability or certainty for governmental entities in the day-to-day performance of their public functions.

CONCLUSION

Rowland, *supra* and this case address legislative mandates of the highest order because the statutes at issue waive the government's immunity from suit and confer jurisdiction upon its courts so that they may adjudicate the merits of claims against it. Where such legislative directives are clear and, by their nature, strictly construed, they should not to be lightly cast aside by the judiciary, especially where the judiciary's fundamental power to adjudicate such claims is conferred by the provision itself. In *Robinson v City of Detroit*, 462 Mich 439, 467-68 (2000), this Court stated that "in distorting the statute [the courts] engage[] in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's

representatives". Hardly a more egregious example of this could be conceived than in cases such as the one now before the Court, where the judicial usurpation itself involves wresting control over the very sovereignty retained by the people to determine when and how they shall be hailed into their own courts of law.

Additionally, as discussed, the statutory notice provision at issue in the instant case substantially differs from the provision at issue in *Rowland*. The more precise language, its "liberal construction" mandate, and the subject matter that it addresses mitigates even more strongly in favor of strictly enforcing its language. Finally, a host of important policy concerns associated with the benefit that publicly funded transportation companies provide to the public and the fact that their assets and liabilities are directly supported thereby, counsel against allowing judicially created conventions to substitute for the requisite written service of notice of a claim against them.

For the reasons stated in this *Amicus Curiae* Brief, MDTC urges the Court to deny leave to appeal, or, alternatively, to peremptorily affirm the Court of Appeals' decision.

Respectfully submitted,

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